

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMAL LACEY,

Defendant-Appellant.

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UNPUBLISHED  
November 2, 1999

No. 206391  
Kent Circuit Court  
LC No. 97-002268 FC

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and of being a third habitual offender, MCL 769.11; MSA 28.1083. Defendant now appeals his convictions as of right. We affirm.

On appeal, defendant first contends that the trial court improperly admitted evidence of other acts pursuant to MRE 404(b). We disagree. The admissibility of such other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

The parties' arguments at the hearing on the motion to admit MRE 404(b) evidence demonstrate that the primary purpose of the evidence was to establish defendant's identity as the perpetrator of this attack by showing a similar method of sexual assault, that being strangulation of his prostitute victims as a prerequisite for his sexual performance and gratification. The prosecutor specifically argued that "the most striking and compelling identification evidence is the unusual, even bizarre nature of the assaults he's committed on these other women." Defense counsel objected on various grounds, primary amongst which was the argument that factual distinctions between the various alleged assaults rendered the other acts significantly dissimilar. Granting the prosecutor's motion, the trial court stated that "some of the evidence, frankly, the bulk of it, is being offered, in reality, to identify Mr. Lacey as the individual who committed this crime, and . . . to establish that there even was a crime." The court found this "something quite different than mere proclivity."

The rule of evidence at issue provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994), the Supreme Court detailed three requirements for introduction of other acts. To be admissible, the evidence must be proffered for a proper purpose under MRE 404(b); it must be relevant, under MRE 402 as enforced through MRE 104(b), to an issue of fact or consequence; and it must pass the balancing test of MRE 403. *Id.* at 74-75. The Court also made clear that admission is only prohibited under MRE 404(b) when the sole purpose is to show an individual's propensity for a particular action based on character inferred by other acts. *Id.* at 65.

The prosecutor essentially proffered this evidence under the "motive" and "scheme, plan, or system in doing an act" language of MRE 404(b)(1). The trial court admitted the evidence under the proffered theory, noting that it could think of no evidence more indicative of modus operandi than the asserted signature described by the prosecutor. MRE 404(b) has been deemed a rule of inclusion, not exclusion, and all that is required is that evidence not be used solely for characterization. *Id.* at 64-65. Here, the prosecutor made no argument that simply because defendant had strangled women in the past, he must have done so in this instance. Rather, the evidence was asserted to be demonstrative of a signature method of strangulation by ligature and also an arguable signature trigger; the trigger being a sexual dysfunction exhibited by defendant's inability to get an erection until he choked his victims. Although the testimony of the other women regarding defendant's similar assaults did not present identical circumstances, this evidence was presented within the framework asserted by the prosecutor. Because it was not used in an attempt merely to show character, we conclude that it was offered for a proper purpose. Because the testimony was properly proffered under MRE 404(b), any inference to defendant's conduct or criminal propensity was secondary and unavoidable. Moreover, an MRE 105 limiting instruction is appropriate when other acts evidence has been admitted. *Id.* at 75. In the instant case, the trial court did instruct the jurors, both at the beginning and the end of trial, that the jurors were not to conclude that defendant was guilty of the charge for which he was on trial because he had done something in the past that was criminal.

In addition to the requirement that it be properly proffered, the other acts evidence must be relevant to an issue of fact or consequence. Relevant evidence is defined as:

[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [MRE 401.]

The discussion in regard to the previous factor is equally applicable here. The issues of whether there had been a crime rather than merely consensual activity, and whether defendant was the perpetrator, were central to the case. Despite defendant's appellate contention that the other acts involved "adjacent facts . . . vastly different than the facts" of the instant case, the prosecutor's theory was that the other acts demonstrated a signature, and that the assaults were so similar in nature the jury would conclude that the perpetrator was the same. The question of similarity was one for the jury to determine, either accepting the prosecutor's argument or disregarding it. Because defendant acknowledged that he and the complainant were together at the location where and on the date she alleges the assault occurred, but contended that he neither assaulted nor had sex with the complainant, this evidence suggesting defendant's repeated manner of contact with prostitutes was relevant.

In *Crawford, supra* at 392-393, the Court discussed the doctrine of chances, a widely accepted theory generally used to rebut claims that the defendant acted accidentally or innocently by showing a repeated pattern of similar action. Under the doctrine of chances as it relates to a defendant, the prosecutor is essentially held to make a showing that the accused was involved in similar incidents more frequently than a typical person. *Id.* at 394. The applicability of the doctrine rests on the similarity of the acts. *Id.* at 395. When these principles are extended to the factual situation now before us, the assertion of relevance is further supported. The prosecutor's introduction of these other acts, all occurring in situations involving prostitutes and relating to sexual activity and defendant's heightened performance post-strangulation, tended to make more probable the prosecutor's argument that defendant had assaulted the victim in this case. The evidence contradicted defendant's claim that the victim was only briefly with him in the basement of his house, when she tagged along with another prostitute for whom he was attempting to secure a place to stay for a while.

The third prong of the *VanderVliet* test addresses the concern of unfair prejudice, requiring application of the balancing test of MRE 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. [MRE 403.]

Evidence presented by the prosecutor is expected to be prejudicial, and MRE 403 prohibits only evidence that is unfairly prejudicial. *Crawford, supra* at 398. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id.* Recognizing that this evidence could be given excessive weight by the jury, the court addressed the problem by providing limiting instructions both before and after the presentation of proofs. Based on our conclusion that the evidence was of significant probative value, proffered for a proper and relevant purpose, we find that it was not unfairly prejudicial. *VanderVliet, supra* at 74-75. There was no abuse of discretion in admission of this evidence of other acts.

Defendant next alleges two instances of instructional error. Jury instructions are reviewed in their entirety to determine if there was error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if the instructions were imperfect, there is no error mandating

reversal if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Because defendant did not object to the specific instructions, however, making only a general objection to the form of the instructions,<sup>1</sup> review is precluded absent manifest injustice. *People v Welch*, 226 Mich App 461, 463; 574 NW2d 682 (1997).

First, defendant contends that both the trial court's preliminary and closing instructions regarding the other acts evidence were improper. We disagree. Defendant argues that the court erred in not giving the standard instruction CJI2d 4.11, thereby not providing specific instruction on how to use the evidence. Because the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court, trial courts are not required to use the standard instructions. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). The trial court's duty is to instruct the jury with regard to the law applicable to the case, MCL 768.29; MSA 28.1052, a duty openly recognized by the trial court as evidenced by its statement, in response to defendant's general objection, that it crafts instructions to deal with the particular case at hand and that it believed its elaboration on the standard instructions had better, but nevertheless correctly, explained the law to the jurors.

We agree with the trial court's belief. Defendant claims that the court's preliminary instruction that the jurors were to use the evidence if it "helps explain what happened here" essentially indicated that they could use defendant's prior conduct to determine if he acted in conformity therewith in the instant case. Though the court's instruction concededly was not as specific as an instruction directing the jurors that they were to use the evidence only if it tended to show a plan or scheme that defendant repeatedly used, see CJI2d 4.11(2)(e), defendant's argument fails to note that in both preliminary and closing instructions, the court unequivocally instructed the jurors that they were not to convict defendant based on these other acts, nor were they to base a finding of guilt on a conclusion that defendant was more likely to have committed this crime because of other bad conduct. See CJI2d 4.11(3). We believe that any insufficiency in the court's direction regarding for what purposes the jurors could use the evidence, was adequately compensated for by the court's clear direction as to how the evidence was not to be used. Viewing the instructions as a whole, we conclude that they sufficiently protected defendant's rights. *Daniel, supra*.

Defendant also alleges that the court's final instruction included language that improperly took from the jurors the decision whether this evidence established other crimes. Defendant claims that the statement: "You also heard evidence which, if you believe it, establishes that Mr. Lacey has engaged in other criminal acts for which he was not prosecuted and convicted," was improper because the court should have instructed the jurors only that if they believed the relevant testimony, then other "acts" had been shown. We infer that defendant's contention is that mention of the criminal nature of these acts was prejudicial. In *People v Nabers*, 103 Mich App 354, 367-368; 303 NW2d 205 (1981), rev'd in part on other grounds 411 Mich 1046; 309 NW2d 187 (1981), this Court approved a trial court's instruction stating that "[Y]ou have heard evidence tending to show that the Defendant was guilty of the offense of robbery armed for which he is not on trial." We held that the instruction was "almost a word-for-word rendition of CJI 4:10:01" [now CJI2d 4.11(1)]. *Id.* at 368. The only distinction between that and the instant instruction is this trial court's omission of the specific names of the various assault offenses applicable to the other acts evidence. The jurors were still appropriately instructed that

it was their decision whether to believe the testimony. Given the clear instructions not to base guilt on previous conduct, we fail to understand defendant's implication that prejudice allegedly arose from the court's mention of establishing criminal acts, but would not have been present had the court omitted the word criminal. The legal status of the previous conduct was irrelevant under the court's instruction as defendant's rights were sufficiently protected.

Finally, defendant contends that the court's instruction regarding the complainant's testimony removed from the jury's determination the elements of the crimes charged and freed the prosecution from its burden to prove each element. Again, we disagree. The instruction in question, "If you are convinced beyond a reasonable doubt that [the complainant] told you the truth, then you have enough to convict Mr. Lacey," was provided as part of the court's instructions specific to the charged offense of first-degree criminal sexual conduct. As such it presented an accurate statement of the law: in prosecutions for criminal sexual conduct, a sexual assault victim's testimony need not be corroborated. See MCL 750.520h; MSA 28.788(8); *People v Smith*, 149 Mich App 189, 195; 385 NW2d 654 (1986). The court was clear in its surrounding instructions that the jurors were to make their own determinations whether they believed the victim's testimony. The court merely explained that if the jurors did believe her testimony, it was enough to find defendant guilty because it presented evidence of each of the elements of penetration, lack of consent, and defendant's use of a dangerous weapon. MCL 750.520b(1)(e); MSA 28.788 (2)(1)(e). The court did not make findings for the jurors, it simply instructed that the testimony, if believed, was sufficient to satisfy the legally defined elements of the offense of first-degree criminal sexual conduct. We conclude that there was no error in the court's instructions, and consequently that there was no manifest injustice.

We affirm.

/s/ Richard A. Bandstra

/s/ Patrick M. Meter

Judge Markman did not participate.

<sup>1</sup> Defendant made no objection to the court's preliminary instructions, but did make a general objection to the court's failure to use the standard jury instructions in its final instructions. The specific instructions now contested, however, were not directly referenced, defense counsel mentioning only the court's instruction describing criminal sexual conduct as a crime of violence, and its instruction regarding impeaching witnesses with prior statements.